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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

JAN E. KRUSKA,

Plaintiff,

VS.

PERVERTED JUSTICE FOUNDATION  
INCORPORATED, et al.,

Defendants.

No. CV 08-00054-PHX-SMM

## ORDER

Pending before the Court are the Motion for Summary Judgment filed by Plaintiff Jan Kruska (“Plaintiff”) (Dkt. 245),<sup>1</sup> the Motion to Dismiss Plaintiff’s Copyright Infringement Claim filed by Defendants Perverted Justice Foundation Incorporated and Xavier Von Erck (“Defendants”) (Dkt. 246),<sup>2</sup> Defendants’ Request for Judicial Notice (Dkt. 247), and Plaintiff’s Request for Judicial Notice. (Dkt. 250.) Defendants also filed a Supplement to

<sup>1</sup>Plaintiff's Motion for Summary Judgment was filed on February 4, 2010 (Dkt 245), and Defendants filed a Response on March 8, 2010. (Dkt. 248.) No Reply was filed by Plaintiff.

<sup>2</sup>Defendants' Motion to Dismiss was filed on February 26, 2010 (Dkt. 246), along with their Request for Judicial Notice. (Dkt. 247). Defendants filed a Supplement to their Motion to Dismiss on March 12, 2010. (Dkt. 249.) On March 19, 2010, Plaintiff filed a "Request for Judicial Notice." (Dkt. 250.) While not technically labeled as a Response, Plaintiff addresses the arguments raised in Defendant's initial Motion to Dismiss. Thus, the Court will construe this document as Plaintiff's Response.

1 their Motion to Dismiss. (Dkt 249.) For the reasons that follow, the Court will deny both  
2 Plaintiff's Motion for Summary Judgment and Defendants' Motion to Dismiss.

### 3 **BACKGROUND**

4 While Plaintiff's Complaint named numerous defendants, the Court will recount only  
5 the procedural history pertaining to the present two Defendants. On January 10, 2008,  
6 Plaintiff brought suit against Defendants alleging claims for intentional infliction of  
7 emotional distress, defamation, violations of the Racketeer Influenced and Corrupt  
8 Organizations statutes ("RICO"), cyberstalking/cyberharassment, violations of the Digital  
9 Millennium Copyright Act ("DCMA"), and prima facie tort. (Dkt. 1.) On March 21, 2008,  
10 Defendants filed a motion to dismiss based upon lack of personal jurisdiction, failure to state  
11 a claim, and insufficient service of process. (Dkt. 44.) The Court granted Defendants'  
12 motion to dismiss for lack of personal jurisdiction, but the Court did so without prejudice to  
13 allow Plaintiff to amend and re-file her complaint. (Dkt. 139.) On January 7, 2009, Plaintiff  
14 filed an Amended Complaint. (Dkt. 142.) The Amended Complaint reasserted the claims  
15 that Plaintiff made in the original Complaint. (Compare Dkt. 1 at 13-19, with Dkt. 142 at 37-  
16 44.) Following the filing of another motion to dismiss, the Court found that Plaintiff had  
17 failed to state a claim against Defendants as to all claims but copyright infringement. (Dkt.  
18 184.) Consequently, all claims with the exception of copyright infringement were dismissed  
19 against Defendants.

20 On January 11, 2010, the Court held a scheduling conference at which both Plaintiff  
21 and Defendants were present. (Dkt. 235 (minute entry); Dkt. 240 (transcript).) At that  
22 conference, Plaintiff admitted that she has never registered any of her photographs or written  
23 materials with the United States Copyright Office. On January 25, 2010, the Court issued  
24 an Order allowing the parties to submit motions on the limited issue of the effect of  
25 Plaintiff's failure to register her copyright on her copyright infringement claim. (Dkt. 243.)  
26 The pending motions and requests for judicial notice are in response to that Order.

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1 judicial notice of the transcript excerpt from the January 11, 2010 Preliminary Pretrial  
2 Conference.<sup>3</sup>

3 Additionally, Plaintiff requests that the Court take judicial notice of the Supreme  
4 Court's opinion in Reed Elsevier, Inc. v. Muchnick, 130 S.Ct. 1237(2010). (Dkt. 250).  
5 Plaintiff states that this decision defeats Defendants' argument, discussed below, that the  
6 Court lacks subject matter jurisdiction over Plaintiff's copyright infringement claim due to  
7 her failure to register her copyright. The recent decisions of the U.S. Supreme Court are not  
8 appropriate subjects for judicial notice as Rule 201 "governs only judicial notice of  
9 adjudicative facts." Fed. R. Evid. 201(a). Rather than asking the Court to take judicial  
10 notice under Federal Rule of Evidence 201, Plaintiff appears simply to be directing the Court  
11 to the Reed Elsevier decision. Thus, Plaintiff's request for judicial notice is denied.

## 12 **II. Defendants' Motion to Dismiss**

13 The Court has dismissed all claims with prejudice against Defendants, with the  
14 exception of Plaintiff's copyright infringement claim. (Dkt. 184.) In her Amended  
15 Complaint, Plaintiff alleges that Defendants created a "Wikisposure" website about Plaintiff  
16 where "four copyrighted images of Plaintiff" and "numerous copyrighted written materials"  
17 were used without her permission. (Dkt 142 at 9.) However, nowhere in her Complaint does  
18 she allege any facts showing that she registered either the images or written materials with  
19 the United States Copyright Office. (Dkt 142.) At the January 11, 2010 Preliminary Pretrial  
20 Conference, the Court questioned Plaintiff regarding the apparent lack of registration. In  
21 response, Plaintiff admitted that none of the photographs were "federally registered." (Dkt.  
22 240, Tr. 5:12-21; Dkt. 247.) The writings similarly were not registered.

23 In their Motion, Defendants argue that Plaintiff's remaining copyright infringement  
24 claim against them must be dismissed due to lack of subject matter jurisdiction. (Dkt. 246,  
25 5:11-13.) According to Defendants, section 411(a) of the Copyright Act provides that no  
26 infringement action may be instituted until either registration of the copyright is made or the

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28 <sup>3</sup>The transcript excerpt is attached as Exhibit 1 to Document 247.

1 Copyright Office has refused to register the copyright. (Id. at 3:17-23.) As a result, federal  
2 courts lack subject matter jurisdiction to entertain a copyright infringement claim unless the  
3 disputed copyright is registered. (Id. at 3:23-4:16.) Since Plaintiff admitted at the  
4 Preliminary Pretrial Conference that she has never registered any of her photographs or  
5 written materials, her copyright infringement claim must be dismissed. (Id. at 5:8-10; Dkt  
6 247.)

7 The U.S. Constitution grants Congress the power “[t]o promote the Progress of  
8 Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to  
9 . . . their . . . Writings.” Art. 1, § 8, cl. 8. As a means of exercising this power, Congress has  
10 developed a statutory scheme governing the existence and scope of copyright protection for  
11 “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. §  
12 102(a). This scheme gives copyright owners “exclusive rights” to distribute, reproduce, or  
13 perform their works publicly. § 106. Anyone who violates any of the copyright holder’s  
14 exclusive rights as set forth in the Copyright Act is an “infringer of the copyright.” § 501(a).  
15 Such infringement entitles the copyright owner to sue for infringement, subject to the  
16 requirements of section 411 of the Copyright Act. § 501(b). With limited exceptions, the  
17 Copyright Act “requires copyright holders to register their works before suing for copyright  
18 infringement.” Reed Elsevier, 130 S. Ct. at 1241 (citing 17 U.S.C. § 411(a)).<sup>4</sup> Registration  
19 is therefore a “precondition” to suing for infringement of a particular copyright. Id.

20 In its recent Reed Elsevier decision, the U.S. Supreme Court considered whether  
21 section 411(a) deprived a federal court of subject matter jurisdiction to adjudicate a copyright  
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24 <sup>4</sup>These exceptions include where the work is not a U.S. work, where the infringement  
25 claim concerns rights of attribution and integrity under section 106A, or where the copyright  
26 holder attempts to register the work and registration is refused. Additionally, section 411(c)  
27 allows court to adjudicate infringement actions involving certain types of unregistered works  
28 where the author “declare[s] an intention to secure copyright in the work” and “makes  
registration for the work, if required by subsection (a), within three months after [the work’s]  
first transmission.” 17 U.S.C. §§ 411(c)(1)-(2).

1 infringement claim involving unregistered works. The Court held that “Section 411(a)’s  
2 registration requirement is a precondition to filing a claim that does not restrict a federal  
3 court’s subject-matter jurisdiction.” Id. In reaching its decision, the Court adopted the  
4 approach used in Arbaugh v. Y&H Corp., 546 U.S. 500 (2006) to distinguish jurisdictional  
5 conditions from elements of a claim or claim-processing requirements. First, section 411(a)  
6 did not “clearly state[]” that its registration requirement was jurisdictional. Reed Elsevier,  
7 130 S.Ct. at 1245. Second, section 411(a)’s registration requirement is located in a separate  
8 provision from those granting federal courts subject matter jurisdiction over copyright  
9 claims. Id. at 1245-46. Federal courts have subject matter jurisdiction over copyright  
10 infringement claims pursuant to 28 U.S.C. § 1331 and § 1338.<sup>5</sup> Id. at 1246. Neither section  
11 conditions jurisdiction on whether a copyright holder has registered the work prior to suing  
12 for infringement. Id. Finally, no other factor suggests that section 411(a)’s registration  
13 requirement can be read to “speak in jurisdictional terms or refer in any way to the  
14 jurisdiction of the district courts.” Id. (citation omitted).

15 Under Reed Elsevier, even if a plaintiff files a claim for copyright infringement  
16 without satisfying § 411(a)’s registration requirement, a federal district court has jurisdiction  
17 over the claim. This case defeats Defendants’ argument that the Court lacks subject matter  
18 jurisdiction over Plaintiff’s copyright infringement claim. Indeed, Defendants’ Supplement  
19 appears to acknowledge as much (Dkt. 249).

20 The U.S. Supreme Court’s Reed Elsevier decision changed the landscape with regard  
21 to a federal court’s subject matter jurisdiction to adjudicate a copyright infringement claim  
22 involving unregistered works. Reed Elsevier was issued on March 2, 2010, after Defendants  
23 had filed their initial motion, and led them to file a Supplement. (Dkt. 249.) In their  
24 Supplement, Defendants seemingly shift their argument from one grounded in subject matter  
25 jurisdiction to one based on failure to state a claim. However, allowing Defendants to change

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27 <sup>5</sup>Federal law confers “original jurisdiction of any civil action arising under any Act  
28 of Congress relating to . . . copyrights” on United States district courts. 28 U.S.C. § 1338(a).  
Such jurisdiction is exclusive. Id.

1 their argument now, after filing their Motion to Dismiss, would not afford Plaintiff an  
2 opportunity to respond to Defendant's new argument. Thus, Defendants' Motion to Dismiss  
3 based upon subject matter jurisdiction is denied. Should Defendants wish to bring another  
4 motion based upon Plaintiff's failure to register her copyright, the Court will consider such  
5 a motion.

### 6 **III. Plaintiff's Motion for Summary Judgment**

7 In her Motion, Plaintiff asserts that the disputed images and writings are subject to  
8 copyright protection. (Dkt. 245, 2-3.) Plaintiff goes into great detail discussing how a  
9 copyright is created, and arguing that she enjoys exclusive rights to her copyrighted  
10 materials. (Id.) However, as Defendants point out, even assuming Plaintiff is entitled to  
11 copyright protection in the images and writings, Plaintiff's failure to register this copyrighted  
12 material prevents her from bringing an infringement action. (Dkt. 248, 3-4.) Plaintiff  
13 ignores the distinction between the existence of a valid copyright and the registering of a  
14 copyright allowing a copyright infringement suit to be brought. See Kodadek v. MTV  
15 Networks, Inc., 152 F.3d 1209, 1211 (9th Cir. 1998) ("Copyright registration is not a  
16 prerequisite to a valid copyright, but it is a prerequisite to a suit based on copyright.").  
17 Plaintiff has failed to allege any facts in her Amended Complaint showing that she either  
18 applied for or received a copyright registration for the four photographs or written materials.  
19 Moreover, she admitted at the Preliminary Pretrial Conference that she has never registered  
20 any of her photographs or written materials. (Dkt. 240, 247.) Therefore, Plaintiff's first  
21 argument lacks merit.

22 Additionally, Plaintiff argues that the "doctrine of fair use" is not a defense available  
23 to Defendants. (Dkt. 245, 3-4.) Plaintiff claims that by asserting the fair use doctrine,  
24 Defendants have admitted that they were not the original creators or owners of the  
25 copyrighted pictures and writings, and that they used these materials without her permission.  
26 (Id.) Furthermore, she argues that none of the categories that qualify for fair use apply in this  
27 case. (Id.)  
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1 To present a prima facie case of direct copyright infringement, Plaintiff must satisfy  
2 two requirements: (1) she must show ownership of the allegedly infringing material and (2)  
3 she must show that the alleged infringers violated at least one of the exclusive rights granted  
4 by 17 U.S.C. § 106 to the copyright holder. 17 U.S.C. § 106 (2006); A&M Records, Inc. v.  
5 Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001). But the rights conferred to the copyright  
6 holder under 17 U.S.C. §106 are limited by the “fair use” doctrine. The fair use doctrine  
7 allows the use of copyrighted works without the copyright owner’s consent under certain  
8 situations, including “criticism, comment, news reporting, teaching . . . scholarship or  
9 research.” 17 U.S.C. § 107 (2006); see Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146,  
10 1159 (9th Cir. 2007) (“Even if a plaintiff . . . makes a prima facie case of direct infringement,  
11 the defendant may avoid liability if it can establish that its use of the images is a ‘fair use’  
12 as set forth in 17 U.S.C. § 107.”) (citation omitted). To determine if the unauthorized use of  
13 the copyrighted material is protected by the fair use doctrine, the court must evaluate (1) the  
14 purpose of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality  
15 of the portion used compared to the copyrighted work as a whole, and (4) the effect of the  
16 use upon the potential market for, or the value of, the copyrighted work. Perfect 10, 508 F.3d  
17 at 1163 (citing 17 U.S.C. § 107).

18 Despite Plaintiff’s argument, the fair use doctrine is a statutory defense that is relevant  
19 only if the Court considers the merits of Plaintiff’s copyright infringement claim. No  
20 discovery has been conducted by the parties, and no merits determination has been made by  
21 the Court. Plaintiff has not established that she owns the alleged infringing material, much  
22 less that Defendants violated her exclusive rights as a copyright holder. As stated previously,  
23 the Court is only considering now the limited issue of the legal effect of Plaintiff’s failure to  
24 register her copyright. Thus, Plaintiff’s second argument fails, and the summary judgment  
25 motion is denied.

26 Finally, the Court notes that Plaintiff has failed to comply with the Local Rules of  
27 Civil Procedure. Under Local Rule 56.1, “[a]ny party filing a motion for summary judgment  
28 shall file a statement, separate from the motion and memorandum of law, setting forth each



1 material fact on which the party relies in support of the motion. . . . A failure to submit a  
2 separate statement of facts in this form may constitute grounds for the denial of the motion.”  
3 LRCiv 56.1(a). In the present case, Plaintiff has failed to file such a separate statement of  
4 facts outlining each material fact that supports her case, and thus, this is an independent  
5 reason for denying the motion.

6 Accordingly,

7 **IT IS HEREBY ORDERED DENYING** Defendants’ Motion to Dismiss Plaintiff’s  
8 Copyright Infringement Claim. (Dkt. 246.)

9 **IT IS FURTHER ORDERED DENYING** Plaintiff’s Motion for Summary  
10 Judgment. (Dkt 245.)

11 DATED this 6<sup>th</sup> day of May, 2010.

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Stephen M. McNamee  
United States District Judge